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In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF OF *AMICI CURIAE* SERVICES AND ADVOCACY FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS AND AMERICAN SOCIETY ON AGING IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. LGBT Older Adults Need Non-Discriminatory Access To Public Accommodations In Order To Live Out Their Later Years In Dignity 6

II. LGBT Older Adults Continue To Face Significant Discrimination When They Seek To Access Public Accommodations 11

A. Senior Centers 11

B. Adult Independent Living Communities 13

C. Assisted Living And Long-Term Care Facilities 15

D. Funeral Homes And Cemeteries 19

III. Requiring States To Create An Exception To Their Existing Public Accommodations Laws To Allow For Discrimination Based On "Religious Convictions" Would Cause Significant Harm To LGBT Older Adults 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Obergefell v. Hodges,
576 U.S. ___, 135 S. Ct. 2584 (2015) 5, 24, 26

Romer v. Evans,
517 U.S. 620 (1996) 5, 22, 26

Statutes

COLO. REV. STAT. § 24-34-601 (2014) 22

ILL. COMP. STAT. 5/5-101 (2013) 23

ME. REV. STAT. tit. 5, § 4592 (2015) 23

NEV. REV. STAT. § 651.050 (2011) 23

WIS. STAT. § 106.52 (2015) 23

Other Authorities

Admin. for Cmty. Living, U.S. Dep't of Health & Human Servs., *Area Agencies on Aging* 12

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Compl., *Wetzel v. Glen St. Andrew Living Cmty., LLC*, Case No. 1:16-cv-07598 (N.D. Ill. July 27, 2016) 18

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Fitzgerald, Erin, Nat'l Gay & Lesbian Task Force, *No Golden Years at the End of the Rainbow: How a Lifetime of Discrimination Compounds Economic and Health Disparities for LGBT Older Adults* (2013) 7

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Knauer, Nancy J., *"Gen Silent": Advocating for LGBT Elders*, 19 Elder L.J. 101 (2011) 16, 19, 21

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MetLife Mature Mkt. Inst. & Am. Soc'y on Aging (ASA), *Still Out, Still Aging: The MetLife Study of Lesbian, Gay, Bisexual and Transgender Baby Boomers* (2010) 10

Movement Advancement Project (MAP), *Foster and Adoption Laws* 10

Movement Advancement Project (MAP), *Non-Discrimination Laws* 22

Movement Advancement Project (MAP) et al., *LGBT Older Adults and Health Disparities* (2010) 7

Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Improving the Lives of LGBT Older Adults* (2010) 6, 10, 17

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Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders ("SAGE") and the American Society on Aging ("ASA") respectfully submit this brief as *amici curiae* in support of the Respondents.[1]

INTEREST OF AMICI CURIAE

SAGE is the country's oldest and largest organization dedicated to improving the lives of lesbian, gay, bisexual, and transgender ("LGBT") older adults. In conjunction with 27 affiliated organizations in 20 states and the District of Columbia, SAGE offers supportive services and resources to LGBT older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for organizations that serve LGBT older adults.

As part of its mission, SAGE provides services to LGBT older adults who face discrimination when they seek to access public accommodations. Given its extensive work with LGBT elders, SAGE is uniquely positioned to address the severe adverse effects that would result if the Court requires states to carve out an exemption to their public accommodations laws

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[1] Pursuant to Rule 37.6, SAGE hereby states that no counsel for any party authored the brief in whole or in part and no person or entity, other than SAGE, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent correspondence have been filed with the Clerk of this Court.

that would allow businesses and nonprofit organizations to deny a wide range of services to LGBT people.

Founded in 1954 as the Western Gerontological Society, the American Society on Aging is a nonprofit association of diverse individuals bound by a common goal: to support the commitment and enhance the knowledge and skills of those who seek to improve the quality of life of older adults and their families. The membership of ASA is multidisciplinary and includes professionals who are concerned with the physical, emotional, social, economic, and spiritual aspects of aging.

Because ASA's members wish to enhance the quality of life of all older adults, and because discrimination of any kind erodes quality of life, ASA has an interest in opposing all forms of discrimination. Early in its history as a national membership organization, ASA embraced LGBT older people and the professionals who serve them as a key constituency. ASA continues to recognize and support the unique needs of LGBT older people.

SUMMARY OF THE ARGUMENT

This case concerns two young gay men who were approaching the start of their life together. However, this case will affect millions of older LGBT people, many of whom are approaching the end of their lives alone. Unlike Charlie Craig and David Mullins, many of them are single. Many are poor. And many are in declining health. Most of these LGBT older adults are not looking to buy a custom cake, or purchase a floral arrangement, or have their picture taken. They are seeking non-discriminatory access to facilities – such as senior centers, long-term care facilities, and funeral homes – that they need to live out their later years in dignity.

LGBT older adults are especially in need of the services provided by senior centers, long-term care facilities, and other public accommodations. As a result of a lifetime of discrimination, LGBT older adults frequently have poorer physical and mental health than other older adults. They also have higher rates of poverty. At the same time, LGBT elders are twice as likely as other older adults to live alone, half as likely to have close relatives to call for help, and four times less likely to have children to assist them.

Despite the substantial progress that has been made, LGBT older adults continue to face significant discrimination when they seek to access public accommodations. Fear of discrimination deters many LGBT older adults from going to local senior centers, while older same-sex couples are discouraged from moving to adult independent living communities by

agents who show them fewer apartments, quote them higher prices, and subject them to more extensive application requirements than older heterosexual couples. At the same time, LGBT elders have been denied admission to nursing homes and other long-term residential care facilities because of their sexual orientation or gender identity, while LGBT older adults who have been admitted to these facilities have been subjected to discrimination, harassment, and even physical segregation.

The discrimination that many LGBT older adults face does not always end with their deaths. LGBT people have been denied service by funeral homes. They have been barred from being buried beside their spouses and partners. And, in perhaps the final indignity, they have been prevented from having their relationships acknowledged on their gravestones.

Twenty-one states and the District of Columbia have enacted public accommodations laws that protect LGBT Americans, including LGBT older adults, from discrimination in access to, and use of, public accommodations. If the Petitioners prevail, providers of numerous services will be able to argue that, notwithstanding their state's public accommodations laws, they too can refuse to provide certain services to LGBT older adults on the grounds that providing those services would "inherently express ideas" or require them to "participate in events" that "offend [their] religious convictions," Brief for Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, at 38 & 40 (Aug. 31, 2017).

LGBT older adults have experienced a lifetime of discrimination. As a result, many LGBT elders have suffered grave physical, emotional, and financial harm. Over time, however, this Court has made clear that the states may not engage in – and have the authority to prohibit – discriminatory conduct that "demeans or stigmatizes" LGBT people. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2602 (2015); *see Romer v. Evans*, 517 U.S. 620, 629 (1996).

Now, as they approach the twilight of their lives, LGBT older adults dare to believe that they can live out the remainder of their days in dignity, as full and equal citizens. The Court should not make LGBT older adults return to the lives they thought they had left behind – lives in which they never knew when they would be denied the equal treatment that most people take for granted, but in which they were certain that the law would not protect them.

ARGUMENT

I. LGBT Older Adults Need Non-Discriminatory Access To Public Accommodations In Order To Live Out Their Later Years In Dignity

As many as four million American adults age 60 and over identify as LGBT.[2] While many older adults depend on public accommodations such as senior centers and residential care facilities, LGBT older adults are especially in need of these facilities. As a result of a lifetime of discrimination, LGBT older adults frequently have poorer physical and mental health than other older adults.[3] They also have higher rates of poverty[4] and weaker social support networks than their contemporaries.[5]

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[2] Soon Kyu Choi & Ilan H. Meyer, Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* 2 (2016), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-White-Paper.pdf (hereinafter "*Williams LGBT Aging Report*").

[3] *Id.* at 24 (citing Karen I. Fredriksen-Goldsen et al., Inst. for Multigenerational Health, *The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults* (2011)).

[4] *Id.* at 10 (citing Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Improving the Lives of LGBT Older Adults* (2010), *available at* www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf (hereinafter "MAP & SAGE, *Improving the Lives of LGBT Older Adults*")).

[5] MAP & SAGE, *Improving the Lives of LGBT Older Adults*, *supra* note 4, at 48-53.

Poorer physical health. LGBT older adults tend to be in poorer physical health than their peers. Studies have found "higher rates of diabetes, hypertension, [and] disability . . . among aging gay men, lesbians, and bisexual people than among older straight adults."[6] Other "[s]tudies suggest higher levels of chronic and other health problems among LGBT older adults, including asthma, diabetes, HIV/AIDS, obesity, rheumatoid arthritis and . . . cancer."[7] There are a number of reasons for this disparity – including the long exclusion of same-sex couples from civil marriage, which deprived many LGBT older adults of the significant health benefits that being married can provide over the course of a lifetime.[8]

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[6] Erin Fitzgerald, Nat'l Gay & Lesbian Task Force, *No Golden Years at the End of the Rainbow: How a Lifetime of Discrimination Compounds Economic and Health Disparities for LGBT Older Adults* 12 (2013), *available at* www.thetaskforce.org/static_html/downloads/reports/reports/no_golden_years.pdf.

[7] Movement Advancement Project (MAP) et al., *LGBT Older Adults and Health Disparities* 2 (2010), *available at* www.lgbtmap.org/file/lgbt-older-adults-and-health-disparities.pdf.

[8] The health benefits of marriage are well-documented. *See, e.g.*, Amy M. Pienta et al., *Health Consequences of Marriage for the Retirement Years*, 21 J. Fam. Issues 559, 576 (2000) ("Married persons . . . tend to have lower rates of fatal and nonfatal diseases, physical functioning problems, and disability compared to all other marital status groups."); *see also* Am. Med. Ass'n, Policy Regarding Sexual Orientation, Policy H-65.973, *Health Care Disparities in Same-Sex Partner Households* (2012) ("[E]xclusion from civil marriage contributes to health care disparities affecting same-sex households . . . ."). LGBT adults' exclusion

Poorer mental health outcomes. LGBT older adults also tend to "have worse mental health outcomes than their heterosexual counterparts."[9] Indeed, according to one study, LGBT people are three times more likely than other people to have a mental health problem during their lifetime.[10] This reflects the fact that LGBT people have endured "stressors and challenges not experienced by heterosexuals," such as discrimination, rejection, difficulty accepting their sexual orientation, and the need to conceal their orientation from others.[11]

Fewer financial resources. The problems of poor physical and mental health are compounded by the fact that LGBT older adults typically have fewer financial resources than other older adults. A recent study found that nearly one-third of LGBT older adults aged 65 or older, and 48 percent of transgender older adults, have incomes at or below 200 percent of the federal poverty line, compared to one-quarter of all

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from marriage did not fully end until 2015, when this Court decided *Obergefell v. Hodges*.

[9] Richard G. Wright et al., *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 Am. J. Pub. Health 339 (2013), *available at* www.ncbi.nlm.nih.gov/pmc/articles/PMC3558785/pdf/AJPH.2012.301113.pdf (hereinafter "Wright et al.").

[10] Nat'l Alliance on Mental Illness, *Find Support: LGBTQ*, *available at* www.nami.org/Find-Support/LGBTQ.

[11] Wright et al., *supra* note 9, at 339.

non-LGBT older adults.[12] A significant portion of these older adults live in absolute poverty.[13]

Weaker social support networks. As people age, many come to rely on family members, especially spouses and children, for assistance with medical and financial matters. About half of all adults are married.[14] However, because same-sex couples were long excluded from marriage, only about 10 percent of LGBT adults are married to a same-sex spouse.[15]

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[12] Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Understanding Issues Facing LGBT Older Adults* 10 (2016), *available at* www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf (hereinafter "MAP & SAGE, *Understanding Issues Facing LGBT Older Adults*").

[13] One study reported that 15.9 percent of single LGBT men over 65 live in poverty, compared to just 9.7 percent of single heterosexual men their age. *See* M.V. Lee Badgett et al., Williams Inst., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* 9-10 (2013), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf. Although older LGBT couples are less likely to live in poverty than LGBT singles, they are still more likely to be poor than their heterosexual peers. For example, 6.0 percent of lesbian couples 65 years of age and older have incomes below the poverty line, compared to 3.5 percent of heterosexual married couples in the same age group. *Id.* at 15.

[14] Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, Pew Res. Ctr.: Fact Tank (Sept. 14, 2017), *available at* www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens.

[15] Jeffrey M. Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, Gallup (June 22, 2017), *available at* news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx.

Moreover, many states long engaged in practices that impeded the ability of same-sex couples to create families with children, including restricting the ability of LGBT people to adopt.[16] Many LGBT elders also remain estranged from their families of origin.[17]

As a result, LGBT elders are twice as likely as their contemporaries to live alone, half as likely to have close relatives to call for help, and four times less likely to have children to assist them.[18] Indeed, in one study, nearly one-quarter of LGBT older adults reported that they have "no one" to rely on when they are ill.[19]

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[16] Movement Advancement Project (MAP), *Foster and Adoption Laws*, *available at* www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

[17] *Williams LGBT Aging Report*, *supra* note 2, at 6 (citing MAP & SAGE, *Improving the Lives of LGBT Older Adults*, *supra* note 4).

[18] *See* MAP & SAGE, *Improving the Lives of LGBT Older Adults*, *supra* note 4, at 6-7; *see also* Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45-75*, at 17-18 (2014), *available at* www.sageusa.org/files/LGBT_OAMarketResearch_Rpt.pdf (collecting statistics comparing isolation experienced by LGBT and non-LGBT older adults).

[19] MetLife Mature Mkt. Inst. & Am. Soc'y on Aging, *Still Out, Still Aging: The MetLife Study of Lesbian, Gay, Bisexual and Transgender Baby Boomers* 8 (2010), *available at* www.metlife.com/assets/cao/mmi/publications/studies/2010/mmi-still-out-still-aging.pdf.

II. LGBT Older Adults Continue To Face Significant Discrimination When They Seek To Access Public Accommodations

Despite the substantial progress that has been made, LGBT older adults continue to face significant discrimination when they seek to access many public accommodations. Discrimination can take the form of an overt refusal to provide services. As discussed below, however, discrimination also can manifest itself more subtly. In some cases, a provider may offer some services to LGBT older adults, while declining to provide them with other services – just as Jack Phillips did to Charlie Craig and David Mullins. In other cases, the provider may offer all services to LGBT older adults, but may do so on less favorable terms than those offered to other older adults. And in still others, the provider may create (or tolerate) a hostile environment toward the LGBT older adults for whom it is supposed to care.

A. Senior Centers

Many older adults seek to find companionship, support, and perhaps a hot meal at a local senior center. However, many LGBT older adults "fear accessing services at traditional senior centers" because they are "worried about harassment or discrimination."[20]

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[20] MAP & SAGE, *Understanding Issues Facing LGBT Older Adults*, *supra* note 12, at 13.

They have reason to fear. In one study, 28 percent of area agencies on aging[21] reported that LGBT seniors might not be welcomed by local senior service agencies, which operate programs like senior centers and group meal programs.[22] As a result, LGBT older adults are 20 percent less likely than their peers to access such services.[23] While a small number of LGBT-inclusive senior centers have been established in recent years, they often are located far from the LGBT older adults who need them most.[24]

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[21] "An Area Agency on Aging is a public or private nonprofit agency designated by a state to address the needs and concerns of all older persons at the regional and local levels." Admin. for Cmty. Living, U.S. Dep't of Health & Human Servs., *Area Agencies on Aging*, *available at* www.acl.gov/programs/aging-and-disability-networks/area-agencies-aging.

[22] Kelly Abel Knochel et al., *Ready to Serve? The Aging Network and LGB and T Older Adults* 12 (2010), *available at* www.sageusa.org/files/Ready%20To%20Serve%20-%20The%20Aging%20Network.pdf.

[23] *Williams LGBT Aging Report*, *supra* note 2, at 6 (citing MAP & SAGE, *Improving the Lives of LGBT Older Adults*, *supra* note 4; S.J. Czaja et al., *Concerns About Aging and Caregiving Among Middle-Aged and Older Lesbian and Gay Adults*, 20 Aging & Mental Health 1107 (2016)).

[24] Winnie Hu, *New Bronx Senior Center Aims to Provide a More Welcoming Atmosphere*, N.Y. Times (Jan. 13, 2015), *available at* www.nytimes.com/2015/01/14/nyregion/a-new-center-in-the-bronx-will-focus-on-gay-seniors.html?mcubz=1&_r=0 (gay older adult required to take one-hour subway ride from his Bronx home to SAGE's senior center in Manhattan).

B. Adult Independent Living Communities

Adult independent living communities provide services and supports that enable many older adults to preserve their independence, while allowing them to enjoy the companionship that comes from being surrounded by their contemporaries.[25] However, LGBT older adults who seek to live in such communities often face significant discrimination.[26]

A 2014 study documented the extent to which same-sex couples are deterred from moving to

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[25] Several types of residential facilities are available to older adults:

- *Independent living* provides private accommodations (such as apartments and multifamily homes) and services such as housekeeping, maintenance, and dining.
- *Assisted living* bridges "the gap between independent living and nursing home care." Staff provide care to residents who "require assistance with activities of daily living," such as managing their medications, bathing, dressing, walking, and eating.
- *Long-term care* provides nursing and continuous care for older adults who can no longer live independently because of a chronic physical or mental condition.

LeadingAge Ziegler 150, at 12 (2016), *available at* www.ziegler.com/z-media/3215/2016-leadingage-ziegler-150-publication_final.pdf (hereinafter "LeadingAge Ziegler 150").

[26] Because adult independent living facilities typically provide supportive services, they fall within many states' definitions of a public accommodation. *See* Paul Gordon, Am. Seniors Hous. Ass'n, *Seniors Housing Guide to Fair Housing and ADA Compliance* 16-17 (5th ed. 2016), *available at* www.seniorshousing.org/filephotos/news/file/2015_sh_ guide_to_fair_housing_booklet-lo.pdf.

residential facilities intended for older adults.[27] The study used a "matched pair" methodology, in which the same site was visited on two consecutive days, first by a lesbian, gay, or bisexual ("LGB") tester and then by a heterosexual tester with comparable demographics. All testers posed as adults in their 60s or 70s who lived independently with their spouses but were considering moving as a couple to a senior living community.[28]

In 48 percent of the tests, the LGB tester experienced at least one type of adverse, differential treatment.[29] In 12.5 percent of the tests, the LGB tester "experienced multiple forms of adverse, differential treatment."[30] In some cases, providers gave the LGB tester fewer options regarding the living units available. For example, when "the testers inquired about 1-bedroom units, the LGB tester was only given information about 2-bedroom apartments, while the heterosexual tester was provided with the 1-bedroom information requested."[31] In other cases, the provider quoted "higher fees, rental price, and/or more

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[27] Equal Rights Ctr., *Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples* (2014), *available at* https://equalrightscenter.org/wp-content/uploads/senior_housing_report.pdf. The Equal Rights Center conducted 200 tests of housing restricted to older adults, with 20 tests conducted in each of 10 states. The testing focused on independent living facilities, but also included some assisted living and long-term care facilities. The study did not seek to assess discrimination against transgender older adults.

[28] *Id.* at 12-13.

[29] *Id.* at 14.

[30] *Id.*

[31] *Id.* at 14-15.

extensive application requirements to the LGB tester."[32] And, in still others, the provider gave "the heterosexual tester, but not the LGB tester . . . information regarding financial incentives, including promotions for visiting the facility."[33]

C. Assisted Living And Long-Term Care Facilities

Eventually, due to physical or mental decline, many seniors are no longer able to live independently. At that point, some seek to move to assisted living or long-term care facilities.[34] Such residential care facilities could be especially beneficial to LGBT older adults, who are less likely to have the family support networks on which many older adults increasingly depend as they age.[35]

Despite their greater need, many LGBT older adults decline to enter residential care facilities because they believe that they would be discriminated against,[36] ostracized by other residents,[37] and forced to

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[32] *Id.*

[33] *Id.* at 14, 16.

[34] *See supra* note 25 (describing various types of facilities serving older adults).

[35] Justice in Aging, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field* 4 (2015), *available at* www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf (hereinafter "Justice in Aging").

[36] *Williams LGBT Aging Report*, *supra* note 2, at 29.

[37] *Id.* at 30 (citing G.L. Stein et al., *Lesbian and Gay Elders and Long-Term Care: Identifying the Unique Psychosocial Perspectives and Challenges*, 53 J. Gerontology Soc. Work 421 (2010)).

"go back into the closet."[38] Even when LGBT elders overcome those fears and seek to move to a residential care facility, they may be denied admission, or discharged prematurely.[39] At the same time, LGBT older adults who are at a residential care facility may face pressure to change or conceal their sexual orientation or gender identity. LGBT elders in these facilities also have been subjected to discrimination, harassment, and even physical segregation.

Pressure to change or conceal sexual orientation or gender identity. In some cases, LGBT residents of long-term care facilities, the vast majority of which are religiously affiliated,[40] have received pressure "from religious service providers . . . to repent before it is too late."[41] In many other cases, LGBT older adults who live in these facilities face subtle pressure to conceal their sexual orientation or gender identity.

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[38] *Id.*

[39] Justice in Aging, *supra* note 35, at 17.

[40] LeadingAge Ziegler 150, *supra* note 25, at 45 (stating that almost 90 percent of the 150 largest nonprofit senior care facilities "have an affiliation with a religious organization or a fraternal or military group. The majority of those with affiliations are faith-based . . . ." (citation omitted)).

[41] Nancy J. Knauer, *"Gen Silent": Advocating for LGBT Elders*, 19 Elder L.J. 101, 131 (2011) (hereinafter "Knauer").

The experience of one couple, Vera and Zayda, is not uncommon. The two women had been together for 58 years. When Vera's Alzheimer's progressed beyond the point at which she could live at home, Zayda moved her to an assisted living facility. However, because they were fearful of discrimination, the two women told everyone that they were sisters. Later, after Vera's death, Zayda moved to an assisted living facility. Although she had many pictures of Vera and her together, Zayda was too afraid to display them in her new home.[42]

Discriminatory treatment. Residential care facilities may refuse to treat same-sex couples in the same manner as other couples. For example, some facilities have refused to accept a healthcare proxy from an incapacitated patient's same-sex spouse or partner, and instead allowed blood relatives (including relatives who have long been estranged from the patient) to make critical healthcare decisions.[43] Other facilities have not allowed same-sex couples to room together.[44]

Harassment. LGBT older adults in residential care may be forced to survive in a hostile environment. For example, following the death of her same-sex partner of 30 years, Marsha Wetzel, a 70-year-old lesbian, moved to an assisted living facility. Marsha

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[42] Justice in Aging, *supra* note 35, at 7.

[43] *Id.* at 11-12. A healthcare proxy "is a legally binding document that allows individuals to designate an agent to make health-care decisions on their behalf should they become incapacitated." *Id.* at 11.

[44] MAP & SAGE, *Improving the Lives of LGBT Older Adults*, *supra* note 4, at 36.

states that, during her time at the facility, she has been subjected to "a pattern of discrimination and harassment because of her . . . sexual orientation."[45]

Marsha adds that she has been "called countless homophobic slurs, taunted about her relationship with [her late partner,] . . . threatened with bodily harm, bullied and intimidated in all of the communal spaces in the facility, and physically injured by other residents."[46] On two occasions, another resident told her that "homosexuals will burn in hell."[47] The facilities management apparently not only "failed to take prompt action to correct or end the discriminatory conduct," they "retaliated against Marsha for complaining" about it.[48]

Physical segregation. In an effort to placate the prejudices of the other residents, some residential care facilities have physically segregated LGBT older adults. In one case, a nursing home transferred a 79-year-old gay man to a "memory ward" after other residents and their families complained about his presence. The gay elder was not suffering from dementia, but had no family or friends to advocate on his behalf. Confined with residents who had

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[45] Compl. ¶ 4, *Wetzel v. Glen St. Andrew Living Cmty., LLC*, Case No. 1:16-cv-07598 (N.D. Ill. July 27, 2016), dismissed for failure to state a claim under the Fair Housing Act (Jan. 18, 2017), notice of appeal filed (Feb. 15, 2017).

[46] *Id.*

[47] *Id.* ¶ 33.

[48] *Id.* ¶¶ 68-69.

Alzheimer's disease and other cognitive impairments, he eventually hanged himself.[49]

"Transgender older adults . . . are particularly vulnerable in nursing homes and assisted living facilities."[50] In one study, 14 percent of the respondents who had been admitted to a residential care facility in which the staff was aware of their transgender status reported that they had been "denied equal treatment or service, verbally harassed, or physically attacked because of being transgender."[51]

D. Funeral Homes And Cemeteries

Many older people turn to a funeral home for assistance during the dark days following the loss of a spouse or long-time partner. In some cases, however, funeral homes have refused to provide services to LGBT people. Here is how Jack Zawadski described what happened to him and his late spouse, Robert Huskey. The two men, both retired special education teachers, were in a committed relationship for 52 years.[52] In July 2015, just weeks after this Court's decision in *Obergefell*, they were married.[53] In the

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[49] Knauer, *supra* note 41, at 133.

[50] Justice in Aging, *supra* note 35, at 14.

[51] Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 219 (2016), *available at* www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

[52] Compl. ¶ 10, *Zawadski v. Brewer Funeral Servs. Inc.*, Case No. 55CI1-17-cv-00019-CM (Miss. Cir. Ct. Mar. 7, 2017).

[53] *Id.* ¶ 12.

months that followed, Bob's physical condition deteriorated rapidly.[54] When 82-year-old Jack could no longer care for him at home, Bob was moved to a nursing home, where his health continued to decline.[55]

Recognizing that his husband was nearing the end of his life, Jack arranged that, upon Bob's death, a local funeral home would pick up Bob's body, transport it to the funeral home, and provide requested mortuary services.[56] When Bob died, the nursing home contacted the funeral home, which stated that it needed the deceased's "next of kin" to sign some paperwork before it could pick up Bob's body.[57] After receiving the paperwork, in which Jack identified himself as Bob's surviving spouse, the funeral home told the nursing home that it would not pick up Bob's remains because it does not "deal with their kind."[58]

The discrimination that many LGBT older adults face does not always end with their deaths. LGBT people may be denied the right to be buried beside their loved ones. Indeed, one of the reasons Jim Obergefell brought his case to this Court was to ensure that eventually he could be buried beside his deceased husband, John Arthur.[59]

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[54] *Id.* ¶ 14.

[55] *Id.* ¶ 15.

[56] *Id.* ¶¶ 20-21.

[57] *Id.* ¶ 25.

[58] *Id.* ¶ 26.

[59] *See Obergefell v. Hodges*, Case No. 14-556, J.A. at 28.

In perhaps the final indignity, LGBT people have been prevented from having their relationships acknowledged at their gravesites. That's what happened to Cynthia Friedman and Sherry Barone, who were a committed couple for 13 years.[60] Prior to her death, Cynthia made a will that named Sherry her executor and authorized her to make burial arrangements.[61] Cynthia told Sherry the precise words she wanted inscribed on the marker above her grave.[62] After Cynthia died, Sherry purchased two adjacent burial plots and ordered Cynthia's gravestone. However, the cemetery refused to make a gravestone that included the three words that Cynthia had chosen to describe her relationship to Sherry.

Those three words were: "Beloved Life Partner."[63]

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[60] Knauer, *supra* note 41, at 142 n.244.

[61] *Id.*

[62] *See* Lambda Legal, *Barone v. Har Jehuda Cemetery*, *available at* www.lambdalegal.org/in-court/cases/barone-v-har-jehuda-cemetery.

[63] After nearly three years of litigation, during which Cynthia's grave remained unmarked, the cemetery agreed, as part of a settlement, to include the inscription Cynthia had wanted. *Id.*

III. Requiring States To Create An Exception To Their Existing Public Accommodations Laws To Allow For Discrimination Based On "Religious Convictions" Would Cause Significant Harm To LGBT Older Adults

Twenty-one states and the District of Columbia have enacted public accommodations laws that protect LGBT Americans, including LGBT older adults, from discrimination in access to, and use of, public accommodations.[64] Such laws provide "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631.

A number of these states expressly include within the scope of their protection access to services and facilities of importance to older adults. For example, Colorado defines a "public accommodation" as:

> any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to . . . a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm.[65]

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[64] Movement Advancement Project (MAP), *Non-Discrimination Laws, available at* www.lgbtmap.org/equality-maps/non_discrimination_laws.

[65] COLO. REV. STAT. § 24-34-601(1) (2014). Other states whose public accommodations statutes apply to discrimination based on

In those states that have extended their public accommodations laws to cover discrimination based on sexual orientation or gender identity, these laws have proven to be a useful tool for combatting discrimination against LGBT people.[66]

Petitioners contend that the State of Colorado cannot apply its public accommodations law to require Jack Phillips to sell wedding cakes to same-sex couples because the very act of making a cake "inherently" would require him to "express ideas" and "participate in events" that "offend his religious convictions." Pet'rs Br. at 38 & 40. Colorado, they add, has no "compelling interest in forcing cake artists . . . to

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sexual orientation and whose definitions of public accommodations expressly encompass facilities for the elderly include: Illinois, 775 ILL. COMP. STAT. 5/5-101(A)(6) & (12) (2013) (defining "place of public accommodation" to include a "funeral parlor" and a "senior citizen center"); Maine, ME. REV. STAT. tit. 5, § 4592(8)(F) & (K) (2015) (same); Nevada, NEV. REV. STAT. § 651.050(3)(g) & (*l*) (2011) (same); and Wisconsin, WIS. STAT. § 106.52(1)(e)(1) (2015) (defining "public place of accommodation" to include "nursing homes" and "cemeteries").

[66] Approximately four complaints of discrimination based on sexual orientation or gender identity are filed annually for every 100,000 LGBT adults. *See* Christy Mallory & Brad Sears, Williams Inst., *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014*, at 4 (2016), *available at* https://williamsinstitute.law.ucla.edu/wp-content/upload/Public-Accommodations-discrimination-Complaints-2008-2015.pdf. This is actually a higher rate than for race discrimination (three complaints per year for every 100,000 people of color) and sex discrimination (one complaint per year for every 100,000 women). *Id.*

violate their consciences by creating custom wedding cakes that celebrate same-sex marriages." *Id.* at 49.

Contrary to Petitioners' suggestion, this case involves far more than whether bakers can refuse to sell wedding cakes to same-sex couples. *See* Brief for Respondents Charlie Craig and David Mullins at 38, 47-50. This case will determine whether LGBT people, including millions of vulnerable LGBT older adults, will be "consigned to an instability many" of their contemporaries "would deem intolerable in their own lives." *Obergefell*, 576 U.S. at ___, 135 S. Ct. at 2601.

If the Petitioners prevail, providers of numerous services on which LGBT older adults rely will be able to argue that, notwithstanding their state's public accommodations laws, they too can refuse to provide certain services to LGBT older adults because the act of doing so "inherently" would require them to "express ideas" and "participate in events" that "offend [their] religious convictions," Pet'rs Br. at 38 & 40, regarding LGBT people, the relationships into which they enter, and the ways in which they express their gender identity.

Many institutions that provide services to older adults are affiliated with a religious denomination. The impact of a judgment for the Petitioners, however, would sweep far more broadly. Like the Masterpiece Cakeshop, institutions that are not affiliated with any religious organization, but whose proprietors profess religious convictions, also would be allowed to discriminate against LGBT older adults in many situations. For example:

- The director of a senior center could bar a widowed gay man from joining a bereaved spouses support group because allowing the man to participate would necessarily "express messages" about the man's relationship that "would contradict the core of [the director's] beliefs about marriage." Pet'rs Br. at 21.

- The operator of an adult independent living community could refuse to allow a lesbian couple to live in a one-bedroom apartment on the grounds that signing a residency agreement with the two women would force him to be "an *active* participant," Pet'rs Br. at 38 (emphasis in original), in a living arrangement that is not "consistent with the tenets of his faith," *id.* at 1.

- The manager at an assisted living facility could order the staff not to help a transgender resident put on clothing that expresses her gender identity, or call the resident by her chosen name, because doing so would "communicate messages," Pet'rs Br. at 21, "at odds with his religious beliefs," *id.* at 9, that gender is divinely ordained and immutable.

- The owner of a nursing home could refuse to tell a gay man that, as next of kin, he has the right and the responsibility to make critical healthcare decisions for his incapacitated husband, on the grounds that the owner "would consider it sacrilegious to express . . . an idea about marriage that conflicts with his religious beliefs." Pet'rs Br. at 9.

- The director of a funeral home, perhaps styling himself a "mortuary artist," could refuse to create a "custom funeral" for a deceased lesbian on the grounds that treating the deceased's widow as a surviving spouse would require him to "announce through [his] voice that a marriage [had] occurred and should be celebrated," Pet'rs Br. at 2.

- The operator of a cemetery could refuse to allow a gay man to be buried next to his husband because allowing the men to be buried beside each other would "necessarily express ideas about marriage and the couple," Pet'rs Br. at 15.

- A memorial monument maker could refuse to make a gravestone that refers to a deceased lesbian as a "loving wife" because gravestones are "an artistic medium through which [monument] designers speak," Pet'rs Br. at 7.

LGBT older adults have experienced a lifetime of such discrimination. As a result, many LGBT elders have suffered grave physical, emotional, and financial harm.[67] Over time, however, this Court has made clear that the states may not engage in – and have the authority to prohibit – discriminatory conduct that "demeans or stigmatizes" LGBT people. *Obergefell*, 135 S. Ct. at 2602; *see Romer*, 517 U.S. at 629.

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[67] *See* MAP & SAGE, *Understanding Issues Facing LGBT Older Adults*, *supra* note 12, at 6-11 (describing the "lasting impacts of discrimination" on LGBT older adults).

Now, as they approach the twilight of their lives, LGBT older adults dare to believe that they can live out the remainder of their days in dignity, as full and equal citizens. The Court should not make LGBT older adults return to the lives they thought they had left behind – lives in which they never knew when they would be denied the equal treatment that most people take for granted, but in which they were certain that the law would not protect them.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the judgment of the Colorado Court of Appeals.

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